

Authorized Managerialism Under the Federal Rules-- and the Extent of Convergence with Civil-Law Judging

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Introduction

A quarter century ago, a junior Professor Judith Resnik helped alert us to the development of “managerial judging” and the many issues it posed.¹ Showing unease with trends that others had presented as warranted responses to changing adjudicatory needs,² she described many changes from a relatively passive judicial role in pretrial case development and raised several concerns:

In the rush to conquer the mountain of work, no one--neither judges, court administrators, nor legal commentators--has assessed whether relying on trial judges for informal dispute resolution and for case management, either before or after trial, is good, bad, or neutral. Little empirical evidence supports the claim that judicial management “works” either to settle cases or to provide cheaper, quicker, or fairer dispositions. Proponents of judicial management have also failed to consider the systemic effects of the shift in judicial role. Management is a new form of “judicial activism,” a behavior that usually attracts substantial criticism. Moreover, judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions. Finally, because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. In short, managerial judging

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¹See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

² See, e.g., Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978).

may be redefining sub silentio our standards of what constitutes rational, fair, and impartial adjudication.³

Professor Resnik concluded with a call not to risk judicial impartiality in the interest of case disposition:

I want to take away trial judges' roving commission and to bring back the blindfold. I want judges to balance the scales, not abandon them altogether in the press to dispose of cases quickly. No one has convincingly discredited the virtues of disinterest and disengagement, virtues that form the bases of the judiciary's authority. Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the continental or inquisitorial model. Until we do so, federal judges should remain true to their ancestry and emulate the goddess Justitia.⁴

She recognized, though, that developments were likely to entrench judicial managerialism: "Unless the Supreme Court and Congress reject proposed amendments to the Federal Rules, pretrial judicial management will be required in virtually all cases."⁵

The then-pending amendments to the Federal Rules of Civil Procedure did take effect in 1983, and rounds of amendments since have reinforced federal district judges' managerial authority in several areas of pretrial procedure. From the relatively informal techniques of pioneers like

³Resnik, *supra* note 1, at 380 (footnotes omitted).

⁴*Id.* at 445 (footnote omitted). For an alternative suggestion, see E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986):

[W]e should think about civil procedure less from the perspective of powers granted to judges, and more from the perspective of incentives created for lawyers and clients. Our current system of civil litigation creates perverse incentives for lawyers, and then relies on judges to police litigant behavior through techniques like managerial judging. If we are not satisfied with the results, we should redesign the system to provide direct incentives for appropriate behavior.

⁵Resnik, *supra* note 1, at 379 (footnote omitted).

Judges Peckham and Schwarzer,⁶ we have moved for better or worse into an era of “authorized managerialism.” It is not my purpose to evaluate this development; the limited empirical evidence on managerial judging’s effectiveness in reducing delay and cost, to which Professor Resnik referred, remains--despite major later efforts--fairly inconclusive.⁷ Instead, in this essay I will first briefly call attention to the specific ways in which federal judges’ managerial powers have been written into the civil rules. Then I will turn to a question to which Professor Resnik alluded--the degree to which pretrial managerial judging, as we have it in American federal courts, entails movement away from traditional American adversarialism and toward convergence with practices in civil-law systems, which are often referred to as inquisitorial. The answer appears to be somewhat, but less so than may have been assumed by some, and with more variation among civil-law systems themselves than is sometimes recognized on this side of the Atlantic.

I. Authorized Pretrial Managerialism in the Federal Rules of Civil Procedure

If one theme can fairly be said to dominate in the rounds of Civil Rule amendments that have been adopted since Professor Resnik’s article, it is the authorization of both specific measures

⁶*See supra* articles cited in note 2.

⁷*See, e.g.*, JAMES S. KAKALIK, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) (reporting reduction in time to disposition from imposing early, firm trial date and other early case-management measures, but with increase in attorney work hours); JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT xxx-xxxv (1996) (summarizing findings including roughly balanced gains and losses from savings in cases disposed of through mandated ADR and added cost and delay in cases not disposed of); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998) (combining discovery and case-management planning with early management reduced disposition time significantly without increasing attorney work hours).

that trial courts can use and the wide discretion they have in pretrial litigation management. A survey of how several key rules have changed over the last quarter century can illustrate the extent of the changes, which may come as something of a surprise to those who have not taken a look back at where we stood around 1980.

A. Sanctions Under Rule 11

Until 1983 Rule 11 was a sleepy little eight-sentence rule, which rather toothlessly stated that an attorney's signature on a pleading certified "that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Sanctions were limited to striking an offending pleading as "sham and false" and to "appropriate disciplinary action"--but only for "a wilful violation." The original Rule 11 had "not been effective in deterring abuses."⁸ The 1983 amendments added not a great many words but imposed an obligation of "reasonable inquiry" while sharpening standards as to both factual allegations and legal bases and discarding wilfulness as a prerequisite for sanctions. They authorized, using apparently mandatory "shall" language, imposition of sanctions either upon motion or on the court's initiative, with discretion about the nature of sanctions but authorization for the award of expenses including attorney fees.

After the explosion of satellite litigation under the 1983 version of Rule 11, the 1993 amendments gave us the rule in its present form. These amendments largely retained the 1983 standards while revising key aspects of the process and sanctions, particularly by introducing the 21-day "safe

⁸FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

harbor” for party-initiated sanction motions⁹ and limiting sanctions to what suffices for deterrence.¹⁰

Sanctions can still be imposed by judicial initiative, after notice and opportunity to show cause why specific conduct did not violate the rule;¹¹ and changing from “shall” to “may”¹² made it explicit that judges have discretion whether to impose sanctions at all as well as in deciding on what they should be. While Rule 11 is far from the leading authority for judicial case management--in particular, it is not a proactive tool and comes into play only after allegedly offending litigant action--it does provide considerable scope for judicial initiative and discretion in dealing with and, we can at least hope, deterring misconduct.

B. Pretrial Conferences, Management, and Scheduling Under Rule 16

If any rule most strongly illustrates the authorization of pretrial managerialism, it is Rule 16.¹³ The change in the title of the rule itself, from “Pre-Trial Procedure; Formulating Issues”¹⁴ at the original framing to the present “Pretrial Conferences; Scheduling; Management”¹⁵ in 1983

⁹See FED. R. CIV. P. 11(c)(1)(A) (requiring Rule 11 motions to be served but not initially filed with court and giving served party 21 days to withdraw or correct challenged filing).

¹⁰See FED. R. CIV. P. 11(c)(2) (sanction imposed for Rule 11 violation “shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated”).

¹¹See FED. R. CIV. P. 11(c)(1)(B).

¹²See FED. R. CIV. P. 11(c).

¹³See, e.g., Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 603 (1989) (“I think it can be safely said that the ‘passive model’ of judging no longer prevails, and that in Rule 16 the drafters endorsed--if not by mandating aggressive judicial involvement, then by at least expressly permitting such involvement--the managerial model of judging.”). In fact, since 1983 pretrial case management has been at least partly mandatory in cases not exempted by local rule under Rule 16(b)’s requirement, see *infra* text accompanying note 22, of a scheduling order.

¹⁴FED. R. CIV. P. 16, 308 U.S. 645, 684 (1938) (amended 1983).

¹⁵FED. R. CIV. P. 16.

reflects how the rulemakers largely took over a rule number to set up a detailed set of pretrial management and scheduling objectives, procedures, and possible measures. What we had from 1938 to 1983 was a rule that permitted the court to summon attorneys to a conference to consider such matters as simplification of issues, pleading amendments, admissions, limiting the number of expert witnesses, and reference of issues to a master.¹⁶ It did allow entry of pretrial orders to control the later course of the action,¹⁷ and considerable pretrial-management practice developed under the rule as it stood¹⁸ as well as less formally.

Several of the specific points in original Rule 16 still appear in today's version, but its length and scope are far greater as a result of the 1983 and 1993 amendments. Amendments that took effect December 1, 2006 added, as part of a package of amendments dealing with discovery of electronically stored information, authority to include in the Rule 16(b) scheduling order provisions for e-discovery and party agreements on asserting claims of privilege or trial-preparation protection after production.¹⁹ As *Moore's Federal Practice* now puts it,

Rule 16 is explicitly intended to encourage the active judicial management of the case development process and of trial in most civil actions. Rule 16 calls on judges to fix deadlines for completing the major pretrial tasks and encourages judges to actively participate in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates use of a wide range of case management tools and powers--princi-

¹⁶See FED. R. CIV. P. 16, 308 U.S. 645, 684 (1938) (amended 1983).

¹⁷See *id.*

¹⁸See Richey, *supra* note 13, at 601-02 (surveying pre-1983 practice under Rule 16, including judicial promotion of settlement).

¹⁹See FED. R. CIV. P. 16(b)(5)-(6).

pally through pretrial conferences. It also authorizes a wide range of sanctions for violations of pretrial orders.²⁰

The rule, originally half a page and now about three pages, in its six subdivisions starts with authorization for pretrial conferences and lists their objectives.²¹ Its two main subdivisions, (b) and (c), dovetail with the parties' required early Rule 26(f) conference by requiring an early scheduling order with mandatory and discretionary scheduling items²² and provide a sixteen-item, open-ended list of subjects that can be considered, and appropriate action taken upon, at any pretrial conference.²³ These include, as augmented by the 1993 amendments to Rule 16(c), issue-narrowing, discovery scheduling, summary adjudication, settlement and ADR, severance and trial bifurcation, and trial-time limits. The briefer three final subdivisions authorize a final pretrial conference, deal with pretrial orders, and authorize sanctions for failure to obey scheduling orders plus failures to appear at, be prepared for, or participate in good faith in a scheduling or pretrial conference. By any measure, Rule 16 gives judges more managerial arrows than can fit in an ordinary quiver.

C. Managing Class Actions Under Rule 23

Authorized managerialism under Rule 23 has a somewhat longer pedigree than under most other rules, with Rule 23(d) on orders in the conduct of class actions going back to the major 1966 amendments that created the present prerequisites and categories. Rule 23(d)'s five-point list begins with broad authority to "make appropriate orders: (1) determining the course of the proceed-

²⁰3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 16-1 (3d ed. 2006).

²¹See FED. R. CIV. P. 16(a).

²²See FED. R. CIV. P. 16(b).

²³See FED. R. CIV. P. 16(c).

ings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument” and ends with the catchall “(5) dealing with similar procedural matters.” In between are discretionary authority to require notice to class members beyond that required for (b)(3) common-question actions under Rule 23(c)(2), to impose conditions on class representatives and intervenors, and to require that pleadings be amended appropriately when an action with class allegations will proceed on a non-class basis. Rule 23(d) ends with authority to combine 23(d) orders with orders under Rule 16, which as we have seen has been greatly expanded since Rule 23(d)’s adoption in 1966.

After efforts in the 1990s to amend standards for certifying class actions were abandoned, and interlocutory appeal from class-certification grants and denials authorized,²⁴ the Advisory Committee turned to amendments governing the appointment of class counsel, settlement, and attorney-fee awards. These took effect December 1, 2003. The counsel-appointment provisions of new Rule 23(g) are largely guidelines for judicial selection of class counsel but make explicit some managerial authority such as requiring potential counsel to provide information pertinent to the appointment and propose terms for attorney fees,²⁵ and including in the appointment order provisions about awards of attorney fees or nontaxable costs.²⁶ The settlement-approval provisions in amended Rule 23(e) largely provide criteria and require procedures, but they include wide discre-

²⁴See FED. R. CIV. P. 23(f) (effective December 1, 1998).

²⁵See FED. R. CIV. P. 23(g)(1)(C)(iii).

²⁶See FED. R. CIV. P. 23(g)(2)(C).

tion as to the manner of giving required notice of a proposed settlement,²⁷ confer discretionary authority to require a second opt-out in connection with settlement of a (b)(3) class action,²⁸ and require court approval of withdrawal of an objection to a proposed settlement.²⁹ New Rule 23(h)'s fee-award provisions in considerable part establish procedural steps but include discretion whether to hold a hearing³⁰ or refer some fee-award issues to a master or magistrate judge.³¹

D. Managing Disclosure and Discovery Under Rules 26-37 and 45

Initial discussion of trial courts' extensive authorized managerial powers in connection with disclosure and discovery seems best approached globally rather than rule by rule, both because of the partial rearrangement of the rules in 1970 and because of parallel provisions in some aspects of different rules. Two requirements involving judicial control that were in the original rules, leave of court to take a deposition³² and a motion and good-cause showing for production and inspection

²⁷See FED. R. CIV. P. 23(e)(1)(B).

²⁸See FED. R. CIV. P. 23(e)(3).

²⁹See FED. R. CIV. P. 23(e)(4)(B). The withdrawal-approval requirement responds at least in part to the problem of "bad objectors," gumming up the settlement works in hope of being paid to go away. As the Advisory Committee delicately put it, some objections "may augment the opportunity for obstruction or delay." FED. R. CIV. P. 23(e)(4)(B) advisory committee's note to 2003 amendment.

³⁰See FED. R. CIV. P. 23(h)(3).

³¹See FED. R. CIV. P. 23(h)(4). The rule may contain an unfortunate inconsistency with Rule 54(d)(2)(D), to which it refers. Rule 23(h)(4) says that the court "may refer issues *related to the amount of the award* to a special master or a magistrate judge as provided in Rule 54(d)(2)(D)" (emphasis added). The latter rule does limit references to masters to "issues relating to the value of services," but it authorizes references of motions "for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive matter"--without the limitation to value issues. In short, Rule 23(h)(4) seems to say that fee-award referrals to magistrate judges can be about how much, and only that; Rule 54(d)(2)(D) allows them as to whether to award fees as well as how much. Rule 72(b) requires de novo district-judge review of challenged magistrate-judge recommendations on dispositive matters, but the apparent inconsistency about scope of referral remains.

³²See FED. R. CIV. P. 26(a), 308 U.S. 645, 694 (1938) (amended 1946).

or entry onto premises under Rule 34,³³ have been eliminated; motion and a showing of good cause remain required only for physical and mental examinations under Rule 35(a).³⁴ The abandoned prior-approval requirements with respect to individual discovery requests, which would no doubt be an impossible burden today, have of course been replaced with extensive powers to plan and manage the disclosure-discovery process as a whole as well as rule on particular issues.

An interesting pattern in discovery management's history is that trial judges' powers in some respects seem to have reached a nadir in 1970, with backlash starting in 1980 and continuing through several rounds of amendments. The prior-approval requirements for depositions and Rule 34 requests were gone by 1970, and the 1970 amendments both expressly made frequency of use of discovery methods unlimited unless otherwise ordered³⁵ and allowed discovery in any sequence and without regard to what other discovery might be taking place.³⁶ One move toward greater

³³See FED. R. CIV. P. 34, 308 U.S. 645, 707 (1938) (amended 1970).

³⁴See FED. R. CIV. P. 35(a).

³⁵See FED. R. CIV. P. 26(a), 398 U.S. 977, 982 (1970) (amended 1983) ("Unless the court orders otherwise under subdivision (c) of this rule [on protective orders], the frequency of use of [the discovery] methods is not limited.").

³⁶See FED. R. CIV. P. 26(d):

... Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

This language, adopted in 1970, still appears in Rule 26(d)--but after a sentence banning discovery efforts in many cases until after the parties' Rule 26(f) planning conference, which is itself to precede the Rule 16(b) scheduling conference. The net effect of these provisions is that discovery will often start at the earliest some weeks after initial pleadings and take place in a sequence at least somewhat regulated by the scheduling order.

judicial control was to broaden protective-order authority from depositions to discovery generally,³⁷ but the overall working of discovery--at least as the rules read around 1970--involved heavy emphasis on party initiative with judicial involvement coming pretty much exclusively upon party motion.

The great difference with the extensive and proactive management authority of today may be more understandable in light of what the Advisory Committee had to say about discovery problems in 1970, based upon a Field Survey of Federal Pretrial Discovery directed by Prof. Maurice Rosenberg of Columbia Law School.³⁸ In terms that sound breathtakingly quaint today, the Committee reported:

No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.³⁹

Contrast the Committee's view just ten years later, when it proposed a new Rule 26(f) authorizing the court to summon the parties for a discovery conference: "There has been widespread criticism

³⁷*Compare* FED. R. CIV. P. 30(b), 308 U.S. 645, 701 (1938) (amended 1970) (protective orders in connection with depositions), *with* FED. R. CIV. P. 26(c) (protective orders generally).

³⁸COLUMBIA PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY: REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (1965). *See* FED. R. CIV. P. 26 advisory committee's Explanatory Statement Concerning 1970 Reorganization of Discovery Rules (referring to Columbia Survey as basis for statements in quotation that follows in text of article).

³⁹FED. R. CIV. P. 26 advisory committee's Explanatory Statement Concerning 1970 Reorganization of Discovery Rules.

of abuse of discovery.”⁴⁰ Still, as originally adopted the discovery-conference authority had to be invoked by party motion.⁴¹

Discovery-rule amendments have been frequent enough since 1980 that proceeding through their history would be pointlessly tedious. Instead, given the basic background of where we started from in 1970, it should suffice to summarize principal managerial powers over disclosure and discovery as they stand in the rules today:

- Since 1983 under Rule 16(b), required setting of a time to complete discovery in a scheduling order⁴² plus authority to modify disclosure times and the amount of discovery to be permitted⁴³ and, now, to include provisions concerning discovery of electronically stored information and party agreements on post-production assertion of privilege or trial-preparation claims;⁴⁴
- Since 1993 under Rule 16(c)(6), consideration at pretrial conferences of “the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37”;⁴⁵

⁴⁰FED. R. CIV. P. 26(f) advisory committee note to 1980 amendment.

⁴¹See FED. R. CIV. P. 26(f), 446 U.S. 995, 1004 (amended 1993).

⁴²See FED. R. CIV. P. 16(b)(3).

⁴³See FED. R. CIV. P. 16(b)(4).

⁴⁴See FED. R. CIV. P. 16(b)(5)-(6); *supra* text accompanying note 20.

⁴⁵FED. R. CIV. P. 16(c)(6).

- Under Rule 26(b)(1) as amended in 2000, authority to decide on party motion whether to allow “subject-matter” discovery for good cause beyond the party-initiated discovery of matter “relevant to the claim or defense of any party”;⁴⁶
- Under Rule 26(b)(2) as amended in 1983, 1993, and 2000, authority on party motion or court initiative to change rule limits on the number of depositions and interrogatories, to limit the number of admission requests, and to limit discovery on such grounds as cumulativeness, bypassed opportunity to get information sought, and cost and burden in relation to stakes;⁴⁷
- Under Rules 26(b)(2)(B) and 45(d)(1)(D) as added in 2006, to deal with contested assertions that electronically stored information is in a source identified as “not reasonably accessible because of undue burden or cost,” including ordering discovery on a showing of good cause and specifying conditions for the discovery, including cost-sharing or cost-shifting;⁴⁸

⁴⁶FED. R. CIV. P. 26(b)(1).

⁴⁷*See* FED. R. CIV. P. 26(b)(2). The 2006 amendment adding the “two-tier” provision of Rule 26(b)(2)(B) on dealing with claims that electronically stored information is in identified sources that are not reasonably accessible split the content of former Rule 26(b)(2) between Rule 26(b)(2)(A) and -(C), with no change in the existing text.

⁴⁸*See* FED. R. CIV. P. 26(b)(2)(B); *id.* advisory committee note to 2006 amendment; FED. R. CIV. P. 45(d)(1)(D).

- Under Rules 26(b)(5)(B) and 45(d)(2)(B) as added in 2006, to deal with claims of privilege or trial-preparation protection as to information, electronically stored or otherwise, that has been produced in discovery⁴⁹ (a power exercised already⁵⁰);
- Under Rule 26(c) as broadened in 1970 and further amended in 1993, to enter protective orders on party motion;⁵¹
- Under Rule 26(d) as added in 1970 and amended in 1993 and 2000, on party motion to control the sequence of discovery;⁵²
- Under Rule 26(f) as amended in 2000, accommodating the “rocket docket” of the Eastern District of Virginia, by local rule to require that the parties’ Rule 26(f) conference and report take place sooner than provided in the rule itself;⁵³
- Under Rule 26(g) as added in 1983 and amended in 1993, to impose sanctions for Rule 11-type violations in connection with disclosures and discovery requests, responses, and objections, *without* the safe-harbor and deterrence-limit provisions of Rule 11;⁵⁴

⁴⁹See FED. R. CIV. P. 26(b)(5)(B), 45(d)(2)(B).

⁵⁰See, e.g., 6 MOORE’ FEDERAL PRACTICE, *supra* note 20, § 26.47[5], at 26-156 to -161 (discussing courts’ approaches to unintended disclosure of privileged material).

⁵¹See FED. R. CIV. P. 26(c).

⁵²See FED. R. CIV. P. 26(d).

⁵³See FED. R. CIV. P. 26(f).

⁵⁴See FED. R. CIV. P. 26(g).

- Under Rule 30(d)(3)-(4) as effective (without subparagraphs) in 1938 and amended in 1970, 1993, and 2000, to impose sanctions for misconduct in depositions and to terminate or limit depositions;⁵⁵
- Under Rule 37 as effective in 1938 and substantively amended in 1970, 1980, 1993, and 2000, to rule on discovery disputes, impose a broad range of sanctions in connection with discovery disputes and misconduct, and to bar use of information by a party who failed to disclose it as required,⁵⁶ subject to a limit added in 2006 mostly forbidding sanctions “under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system”;⁵⁷ and
- Under Rule 45(c) as amended in 1991 and 2006, to protect persons subject to subpoenas for discovery as well as trial.⁵⁸

Discovery must be a fearsome Gulliver to require all those strings, and others I may have overlooked, to tie him down.

⁵⁵See FED. R. CIV. P. 30(d)(3)-(4).

⁵⁶See FED. R. CIV. P. 37.

⁵⁷See FED. R. CIV. P. 37(c).

⁵⁸See FED. R. CIV. P. 45(c).

II. Are We Getting Civil-ized?

It is easy to find statements to the effect that the advance of pretrial managerialism at least moves American and civil-law systems closer together.⁵⁹ Sometimes the assertion seems to be stronger--that our increasing managerialism makes us work more in the way that supposedly “inquisitorial” civil-law judges do. Alfred Cortese and Kathleen Blaner, for example, argue that “there has been a convergence of the systems over time . . . For example, some aspects of the American system, such as the increasingly managerial role played by the judge, mimic the inquisitorial style . . .”⁶⁰ Professor Linda Mullenix states that “particularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge.”⁶¹ And Professor Richard Nagareda sees managerialism working in tandem with a more inquisitorial role in protecting absent class members:

Under the traditional [adversarial] view, courts are to be passive; parties are to be active. In class actions today, these postures are often reversed, with conscientious courts having to assume a more active, inquisitorial, and managerial posture in an

⁵⁹See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 859 (1985) (“What makes the *Manual [for Complex Litigation]* look ‘proto-Germanic’ in the eyes of the comparative lawyer is the informal feel of ‘the conference method;’ and the active judicial role in defining issues, promoting settlement, and fixing the sequence for fact-gathering.”) (footnotes omitted).

⁶⁰Alfred W. Cortese Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: a Question of Parity with Our International Rivals*, 13 U. PA. J. INT’L BUS. L. 1, 20 (1992). They add that “some aspects of the German system, such as counsel’s written and oral arguments, are clearly adversarial,” *id.*, which appropriately reflects that systems are not purely adversarial or inquisitorial but rather blends that place them at various intermediate points along a spectrum.

⁶¹Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 13 (2001) (footnote omitted). She notes a key remaining difference while minimizing it somewhat: “Although our judges still are not fact-finders, it is difficult not to take note of the increasing managerial involvement of judges in the resolution of complex cases, often verging on functions such as fact-finding.” *Id.* at 14.

attempt to safeguard the passive class members whose rights the class judgment stands to govern.⁶²

To speak more precisely about similarities and remaining differences, it seems important to have in mind basic features of the polar “adversarial” and “inquisitorial” models--which, of course, no system employs in pure form. The adversarial model associated with common-law systems presumes a quite passive judge acting in an umpire’s role, with heavy emphasis on party (i.e., lawyer) initiative and control over a wide range of matters.⁶³ In theory, as Professor J.A. Jolowicz has put it, “in the adversary process . . . the best judge [was] the judge who, like a jury, knows nothing of the case he is to try until the trial itself begins”⁶⁴--although judicial involvement in much American pretrial discovery long since made that principle, one might say, inoperable here. Given the degree of party control, the job of judge or jury as trier of fact is not to ascertain, and especially not to ferret out, the truth but to resolve the parties’ dispute based on the facts they put forward;⁶⁵ at best

⁶²Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 374 (2003).

⁶³See, e.g., Neil Andrews, *The Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report*, in REFORM OF CIVIL PROCEDURE: ESSAYS ON “ACCESS TO JUSTICE” 169, 171 (A.A.S. Zuckerman & Ross Cranston eds. 1995) (“Under an adversarial principle, it is the parties who dictate at all stages the form, content and pace of proceedings.”) Andrews goes on to list twelve matters subject to party/lawyer control in England, including at the pretrial stage decisions on adding parties, selecting material facts, pretrial progress, whether to seek interim or summary relief, and settlement. See *id.*

⁶⁴J.A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT’L & COMP. L.Q. 281, 286 (2003). Jolowicz adds that in English practice this idea “has been finally killed off.” *Id.*

⁶⁵Our retention of the civil jury, never a feature in civil-law systems and largely abandoned in other common-law systems, means that at least for cases to be tried before juries dependence on party presentation seems to have to remain predominant.

we may hope that adversary presentation and cross-examination bring out something approximating the truth.⁶⁶

If common-law systems have long worked in ways putting them at some distance from the purest adversarial model, it is probably the case that civil-law courts never worked in anything close to an entirely opposite inquisitorial model. After all, a civil-law judge has no civil dispute to work with until a party initiates a case against one or more opponents,⁶⁷ and parties usually have their own lawyers doing their adversarial best to the extent they can within the system to advance their side's cause. Perhaps two features for our purposes best define the civil-law model with the inquisitorial label often given to it: considerable judge initiative and control in shaping the course of the proceedings generally,⁶⁸ and judicial primacy in fact-gathering.⁶⁹ It is this second feature that seems alone to warrant the use of the term "inquisitorial" and may account for some imprecision in discussions about whether increasing pretrial managerialism in America is making our system more "inquisitorial" in nature.

To the extent that civil-law systems give judges the leading role in deciding on what facts need to be ascertained and bringing them out (thus seeking directly to determine the truth, in con-

⁶⁶See Jolowicz, *supra* note 64, at 283-84 (calling it "a major defect of the adversary system that the judge has no duty to try to ascertain the truth"; noting skeptically Wigmore's claim "that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth.'") (footnote omitted)

⁶⁷See *id.* at 281.

⁶⁸See *supra* note 59.

⁶⁹See Langbein, *supra* note 59, at 825:

Having now made the great leap from adversary control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process.

trast to the pure adversarial model), we seem for the most part not to have moved in their direction.⁷⁰

Neither, as we shall see, do at least some civil-law systems operate in much that way to begin with. But to the extent that civil-law judges take initiatives to shape the course of proceedings--as some do considerably and others less so--American pretrial managerialism does take us in their direction. As Professor Máximo Langer puts it in emphasizing an important distinction, “[U]nlike the court of the inquisitorial system that actively investigates the truth, the managerial court is active to make sure that the parties do not delay proceedings.”⁷¹ And Professor Rolf Stürner concisely summarizes similarities and distinctions between managerialism and inquisitorial judging:

⁷⁰Interestingly, in civil-justice reforms of the 1990s, England moved not only toward greatly increased managerialism but also toward more judicial involvement in fact development. New English procedural rules

provide for a substantial increase in the judge’s powers of control at the expense of those of the parties. . . . The judge also has the power to control evidence, which he may do by giving directions on the issues on which he requires evidence, on the nature of the evidence that he requires to determine those issues and on the way in which the evidence is to be placed before the court.

Jolowicz, *supra* note 64, at 287 (footnote omitted).

⁷¹Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 836 (2005). Langer adds:

If the adversarial system conceives the relationship between the main procedural actors as a dispute between two parties before a passive umpire, while the inquisitorial system presumes an official investigation that impartial officials conduct to find the truth, the managerial judging system conceives procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible.

Id. at 878. The investigative mode, when opposing parties are also involved, can of course also use managerial techniques in an effort to expedite case processing.

Nearly worldwide, civil procedure relies on party activity, but allows for additional court activity. The coordination of party activity requires case management by the court. This case management, which is not an inquisitorial fact finding but invites the parties to coordinate their activities, is mandatory in many continental codes of civil procedure and now in the reformed English procedure, too.⁷²

Such managerial judging will inevitably give the American trial judge a good deal of knowledge of the case before trial, just as civil-law judges have often learned much about their cases in fairly early stages. There remains, though, a key difference in that much--perhaps most--American managerialism deals with discovery; civil-law systems (and, for that matter, other common-law nations) have much less extensive party-initiated discovery than we do.⁷³ So their judges' control must be about other aspects of pretrial procedure--particularly scheduling, issue definition and narrowing, settlement promotion, and of course--where civil-law judges engage in it--"inquisitorial" fact development.

III. Some Particulars

A. Party Control in Civil-Law Systems

One should not understate the degree of control retained by adversarial parties in civil-law systems, even given a baseline in many countries of greater judicial control than in traditional American pretrial practice of the pre-managerial era. In France, for example, party statements of

⁷²Rolf Stürner, *Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT*, 34 INT'L LAW. 1071, 1082 (2000) (footnote omitted).

⁷³See, e.g., KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW* xxvi (2003) ("In the continental system, no such [discovery] rights are recognized. The civil judges exclusively enjoy investigative power."); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002) (discussing discovery similarities and differences in American, other common-law, and civil-law systems).

the claim, defense, and remedy sought define the litigation and even receive explicit protection in the code of civil procedure:

French law recognizes a basic concept of the *objet du litige*, which . . . includes but does not consist exclusively of the remedy sought by the claimant. The phrase is used to refer to . . . the substance of the dispute of which the judge is seised by the parties. The “*objet du litige*,” says the code, “is determined by the respective pretensions of the parties,” and these are the claim, which sets the proceedings in motion, and the defence. The *objet du litige* can be modified by the parties through their incidental claims or defenses, but it is binding on and unalterable by the judge, who must decide on everything that is claimed and only on what is claimed.⁷⁴

But when it comes to the evidence the court receives, “It is clear for France, however, that it is not exclusively for the parties to control the ‘evidence’ that comes before the court for decision.”⁷⁵

Similarly, Spain’s 2000 Law of Civil Procedure

maintains the principles of party disposition . . . as overriding principles of Spanish civil justice. Under these principles, parties determine the subject matter and scope of the issues of the proceeding, if and when it is initiated, and if it is to be voluntarily terminated. Within the proceedings themselves, the parties, not the court, usually decide the source of factual proof for the contentions at issue. . . . A system of civil procedure is designed to protect the rights of individuals involved in legal disputes that, as a general rule, are controlled by the parties to the dispute.⁷⁶

⁷⁴Jolowicz, *supra* note 64, at 291 (footnotes omitted). If the statement of remedy sought limits what relief can be granted, that leaves French courts with less flexibility than their American counterparts. See FED. R. CIV. P. 54(c):

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.

⁷⁵*Id.* at 293. See also *infra* text accompanying notes 80-81.

⁷⁶Ignacio Díez-Picazo Giménez, *The Principal Innovations of Spain’s Recent Civil Procedure Reform*, in THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE [hereafter “REFORMS”] 33, 40 (Nicolò Trocker & Vincenzo Varano eds. 2005).

Whatever the degree of their control and even initiative, then, civil-law judges at least in some systems do not take on the character of what Americans sometimes call roving commissioners.⁷⁷

B. Directions of Movement in Civil-Law Countries

Discussion of pretrial-management changes so far in this essay, and to a considerable extent in the American literature on convergence, has been of American developments and the extent to which they take us toward civil-law patterns. Civil-law systems, of course, are not standing still; interestingly, in responding to modern civil-litigation problems, they are sometimes not moving toward us but in parallel with (or ahead of) us. The role of French judges was defined in quite passive terms from the Napoleonic era until 1965, with the judge initially to do “no more than to decide between the rival contentions of the parties.”⁷⁸ A 1935 reform authorized the judge to “summon the parties and their lawyers to appear before him, but he could not make binding orders and he could do nothing that might prejudice a question of substance.”⁷⁹ Only in 1965 did the French judge get

real power. He can make orders binding on the parties and impose sanctions. He can lay down time limits and he can make orders relating to the *instruction* [fact-finding procedures authorized by the judge]; when it comes to the hearing of witnesses, even if ordered on the application of a party, the judge decides what are the relevant facts to be proved, and it is he who examines the witnesses.⁸⁰

⁷⁷See also HUANG, *supra* note 73, at 25 (despite statement about civil judges’ investigative power quoted in note 73 *supra*, describing as part of civil-law “principle of party presentation” doctrine “that the court cannot conduct an ex officio investigation, and is allowed to investigate only the evidence designated by either party.”) (footnote omitted).

⁷⁸Jolowicz, *supra* note 64, at 290.

⁷⁹*Id.*

⁸⁰*Id.* at 290-91.

Further, the French civil code provides,

“Everyone is bound to co-operate with the administration of justice with a view to revelation of the truth.” In addition the parties are explicitly required . . . to cooperate in the conduct of fact finding measures ordered by the judge.⁸¹

By contrast, under the former Berlusconi government proposed changes in Italian civil procedure went precisely the other way. The model was presented as “privatizing” civil justice, with the preparatory stage “taken away from the hands of the judge and entrusted exclusively to those of the parties’ lawyers. No more ‘managerial judges’, therefore, but only ‘managerial lawyers’ . . .”⁸² The preparatory phase “will consist only *and exclusively* of the exchange of a number of written pleadings and briefs between the parties’ lawyers, without having any contact with the judge. . . . All this may be put to an end only when a party will feel satisfied and will ask the judge to fix the hearing for the presentation of evidence.”⁸³ The current Prodi government is not continuing this movement against the current in most other systems, but has not brought forth any plans to increase the judicial role.⁸⁴ An additional practical factor may limit pretrial managerialism by Italian judges--sheer underinvestment in judicial resources leaving judges so swamped that they

⁸¹*Id.* at 291.

⁸²Michele Taruffo, *Recent and Current Reforms of Civil Procedure in Italy*, in REFORMS, *supra* note 76, 217, 225-26.

⁸³*Id.* at 226 (emphasis in original).

⁸⁴E-mail from Prof. Michele Taruffo, University of Pavia, to author, December 11, 2006.

cannot take managerial initiatives.⁸⁵ In Italian litigation little or no court involvement may take place until one or both parties decide to rattle the judicial cage.

C. Promotion of Settlement and Alternative Dispute Resolution

One phenomenon--not entirely an uncontroversial one--that has come along with American managerial judging is judicial promotion of settlement and use of alternative dispute resolution (ADR) approaches such as early neutral evaluation, court-annexed mediation or arbitration, or other devices. Sometimes judges just suggest one or another form of ADR for a particular case, but it is explicit in Federal Rule 16(c) that they may have the parties consider at pretrial conferences, and “may take appropriate action, with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.”⁸⁶ And on the statute books since 1998 have been requirements that each district court “authorize, by local rule . . . the use of alternative dispute resolution processes in all civil actions [and] devise and implement its own alternative dispute resolution program, by local rule . . . to encourage and promote the use of alternative dispute resolution in its district.”⁸⁷ Promotion of settlement and ADR is thus not just a significant feature of American federal pretrial practice; it is institutionalized.

So it is, and has long been (but with recently increased emphasis) in France. Judicial responsibility to attempt conciliation has been present in the French code of civil procedure for most

⁸⁵Conversation with Prof. Ugo Mattei, September 7, 2006. *See also* Langbein, *supra* note 59, at 824 n.3 (referring to “the systems of Southern Europe, where judicial domination of fact-gathering is less prominent and where less adequate resources have been devoted to developing and motivating the bench”).

⁸⁶FED. R. CIV. P. 16(c)(9).

⁸⁷28 U.S.C. § 651(b) (200x).

of the past two centuries.⁸⁸ Moreover, since 1996 French judges may with party consent appoint a mediator; and since 1998 legal aid has been available to try to help parties reach settlements.⁸⁹ Of Germany, Professor Resnik refers to “the vigorous efforts of German judges to convince parties to settle.”⁹⁰ Similarly, to give just a few other examples, recent reforms in Norway require mediation, and Finland has just adopted a new mediation law; Swedish and English procedural codes and practices entail settlement promotion.⁹¹ It seems unnecessary to delve deeply into practice in other civil-law nations to conclude that some basic similarities are present.

D. Inquisitorial Fact-Finding in America

If it is generally accurate to say that American managerialism does not converge with the inquisitorial aspect of civil-law judging (to the extent that civil-law systems actually have it), such fact-finding is not invariably absent from our managerial judging--although the occasions for it may be quite limited. First, judges may choose to make more use of court-designated experts: “Th[e] transformative potential of *Daubert*,^[92] coupled with the modern willingness to accept the role of

⁸⁸See Jolowicz, *supra* note 64, at 294.

⁸⁹See *id.*

⁹⁰Resnik, *supra* note 1, at 386 (footnote omitted).

⁹¹See Per Henrik Lindblom, ADR--The Opiate of the Legal System? 17 n.51, 18 (2006) (manuscript on file with author).

⁹²See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993):

Faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

the managerial judge, may encourage a greater degree of inquisitorial thinking, opening the door to institutions like court-appointed experts and scientific tribunals.”⁹³ Second, the role of trial judges in deciding whether to approve proposed class settlements, especially when no objectors appear to present challenges, is likely to involve some degree of judicially initiated inquiry.⁹⁴ Third, the role of masters in complex litigation, particularly of the public-law variety, may take on inquisitorial aspects:

[W]hile the pre- and post-trial stages of complex litigation are clearly new developments, the inquisitorial judicial role for which they call--and which masters are being asked to serve--is not. Judicial involvement in managing the litigation (particularly discovery) and in undertaking significant responsibility for fact-finding (including ex parte investigations) is a well-established, longstanding feature of Anglo-American legal culture--a feature of equity's forgotten, quasi-inquisitorial tradition, in which masters played a critical part.⁹⁵

Still, it seems likely that American staffing traditions, including the lack of a civil-servant judiciary trained in fact-gathering, and American norms will sharply limit just how far American judges go in inquisitorial directions:

Suffice it to say that American judges, trained in and accustomed to an adversary structure, are “ill-equipped for effective inquisitorial judging.” Not only is an investigatory or managerial judicial role incompatible with the highly entrenched adversarial norms and customs in the U.S. legal system, but American judges lack the investigatory resources available to judges in an inquisitorial system. The federal

[This footnote added by author.]

⁹³Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1401-02 (2006) (reviewing TAL GOLAN, *LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA* (2004)). See also Langbein, *supra* note 59, at 835-41 (describing use of court-appointed experts in Germany).

⁹⁴See *supra* text accompanying note 62.

⁹⁵Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1197-98 (2005) (footnotes omitted).

judiciary operates on a limited budget and with restricted factfinding powers, limiting its capabilities outside the context of an adversarial dispute. Moreover, even if inquisitorial judging techniques were technically compatible with current legal structures . . . they are not desirable given the democratic premises on which the nation's adversary system is based.⁹⁶

IV. Conclusion

It does appear that some of the gaps between American and civil-law systems have been narrowed by the development and institutionalization of pretrial managerial judging in the federal courts in this country, and by reforms in Europe. In particular, managerialism definitely moves away from the classic adversarial model of the passive judge, and can shift a significant amount of control over the pretrial process from the parties to the court. That general change does bring us somewhat closer to the degree of judicial control often seen in many civil-law systems, although the level of party control in those systems should not be underestimated. But two significant differences remain, both related to approaches to fact-gathering: To the extent that civil-law judges have the main initiative-taking role in the fact-gathering process, American managerial judges largely have not moved in that direction--nor do they seem likely to. Thus we have moved significantly toward "inquisitorial" systems only as that label refers to civil-law systems as a whole, not to their inquisitorial aspect. And as long as American pretrial proceedings involve much more of the kind of discovery that we have now than do other systems, the focus of pretrial management in America will be much more on discovery than elsewhere.

⁹⁶Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 575-76 (2006) (footnotes omitted).

Professors Nicolò Trocker and Vincenzo Varano provide a nuanced view on degrees of convergence and lack thereof in a concluding essay to a volume on recent procedural reforms in several nations:

[T]he reform movement has brought about an attenuation of the differences, according to which we were used to classify procedural models. If the common law procedural systems were usually defined as adversarial, based as they were on the predominance of the parties, they are presently placing more and more emphasis on the role and powers of the judge especially as far as the management of procedure is concerned. . . . Civil law procedural systems, in turn, which used to be labeled as inquisitorial in an even more arbitrary and simplistic way, not only have made clear their adherence to the principles of parties' initiative, and adversary procedure, but they have also reshaped their character, sometimes adopting institutions typical of the common law such as the cross-examination, other times opening the door to such ideas as that embodied in the mechanisms of discovery or moving towards a bifurcation of the proceeding clearly based on the pretrial/trial separation experience.⁹⁷

For the parties and their lawyers, finally, pretrial managerial judging means not only a reduction in the control that they (or their predecessors) were used to exercising in more fully adversarial modes of proceeding. It also requires that the adversarial scorpions in their litigation bottle seek ways to cooperate, at least as to pretrial procedural management, with each other and the judge. Such cooperation may be uncomfortable, although it is likely to be in litigants' enlightened self-interest. And the reduction of control may be unwelcome, although I have heard litigators at conferences confess that they can need "adult supervision." Still, while

institutionalization of managerial judging measures would move our system closer to an inquisitorial [*sic*] system of civil dispute resolution, these measures would not turn our essentially adversarial system into an essentially inquisitorial one. Litigants

⁹⁷Nicolò Trocker & Vincenzo Varano, *Concluding Remarks*, in REFORMS, *supra* note 76, 243, 244-45 (footnotes omitted).

will not lose control over those aspects of their cases that are essential to an adversarial system of justice.⁹⁸

⁹⁸Robert M. Parker & Leslie J. Hagin, “*ADR*” *Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905, 1913 (1993) (footnote omitted).